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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1009

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,

Petitioner,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,

Respondents.

HAYDEN, STONE INCORPORATED, a Delaware corporation,

Petitioner,

vs.

ALEX M. MARKAKIS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

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HAYDEN, STONE INCORPORATED, a Delaware corporation,

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vs.

ALEX M. MARKAKIS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Utah entered in the above cases on September 27, 1973.

I.

Opinions Below.

A copy of the Findings of Fact and Conclusions of Law of the District Court in and for the County of Carbon for the Markakis case (not reported) is at-

tached to this petition as Appendix A. A copy of the Findings of Fact and Conclusions of Law and the Amendments thereof of the District Court for the Piantes case is attached hereto, as Appendix B. A copy of the Order of the District Court (not reported) in the Markakis case is attached hereto as Appendix C. A copy of the Order of the District Court (not reported) in the Piantes case is attached hereto as Appendix D. The Opinion and Judgment of the Supreme Court of the State of Utah in the consolidated cases of Markakis and Piantes, a copy of which is attached hereto as Appendix E, is not yet officially reported, but is unofficially reported in 514 P.2d 529.

II.

Jurisdiction.

The judgments of the Supreme Court of the State of Utah were made and entered on September 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

III.

Questions Presented.

The Utah Supreme Court held that, because petitioner, a nationwide securities brokerage firm, was not licensed as a broker-dealer by the Utah Department of Business Regulations, respondents were entitled by reason of Section 410 of the Uniform Securities Act,[1] to recover from petitioner a penalty in the amount of the price paid by respondents for securities purchased by them through petitioner. Although the Uniform Secu-

[1]Section 61-1-22, Utah Code Annotated.

rities Act has been adopted by 26 states, the District of Columbia and Puerto Rico, the case appears to be one of first impression, and the published opinion of the Utah Court will have dramatic impact upon the securities industry. The questions presented are:

1. Does the pervasive scheme of federal regulation of the securities industry preempt the penalty provision imposed upon petitioner, which provision produces results inconsistent with the federal statutory objective of promoting the flow of capital through the national economy?

2. Does the application of a state statute, which allows all of petitioner's customers to recover from petitioner the purchase price they paid for securities, unreasonably burden interstate commerce in a way unnecessary to enforce the state's broker-dealer licensing requirement?

3. Does the penalty provision violate the Due Process Clause of the Fourteenth Amendment because of the lack of a rational relationship between the purpose of the statute, which is to enforce Utah's broker-dealer licensing requirements, and the imposition of excessive punitive liability without fault?

IV.

Constitutional Provisions and Statutes Involved.

The Supremacy Clause of the United States Constitution (Art. VI, §2), Section 1 of the Fourteenth Amendment to the Constitution and Sections 61-1-3 and 61-1-22 of the Utah Code Annotated are set out in Appendix F. Pertinent portions of Section 2 of the Securities Exchange Act of 1934 (15 U.S.C. 78b) are set forth in the body of this petition in Section IV.1.

V.

Statement.

In November of 1967, Joe Santis and plaintiff-respondent Alex Markakis, both residents of Price, Utah, decided to purchase stock in Royal Inns of America. Markakis and Santis telephoned Earl Gogasian, a former resident of Price and President of Royal Inns of America, and inquired where they could purchase the security. Mr. Gogasian gave the two men the telephone number of the San Diego office of petitioner, Hayden, Stone Incorporated, a nationwide brokerage house. Markakis and Santis telephoned petitioner and were referred to Don Foley, a registered representative employed by petitioner. [R.T. pp. 71-73.]

Subsequently, on or about November 20, 1967, Markakis placed an order with Hayden, Stone's San Diego office to purchase shares of Royal Inns of America common stock. He made no inquiry whether, and had no reason to expect that, petitioner or any of its employees was registered as a broker-dealer or agent in Utah pursuant to the Utah Uniform Securities Act. [R.T. pp. 74-78.] The total purchase price of the stock was $68,461.26. Markakis sold the securities through petitioner in February, 1968, at a profit of approximately $11,000.00. [R.T. pp. 81-83 and Deft. Exs. Nos. 1 and 2.]

The amount realized from the sale, approximately $80,000.00, was subsequently reinvested by Markakis in Royal Inns of America stock through several transactions handled by petitioner. In the fall of 1969, Markakis was notified by petitioner that Don Foley was entering management training and that Phillip Jay, another of petitioner's employees, would handle his ac-

count. In October, 1969, Markakis sold through petitioner, with Mr. Jay acting as registered representative, all of the stock in Royal Inns of America which he had acquired pursuant to the second purchase (with the exception of 100 shares that had been sold the previous May). The total amount realized from these transactions was $105,484.10. [Deft. Ex. No. 4.]

At trial respondent Markakis testified that upon a recommendation made by Mr. Jay while he was in Price for the 1969 deer hunt, Markakis placed a buy order with petitioner for some shares of stock in Occidental Petroleum and King Resources. Subsequently, on December 18, 1969, Markakis purchased 1,000 shares of Royal Inns stock. [R.T. pp. 52 and 55.] It was these three transactions only that Markakis sought to void by this action. This fact underscores the inequity of the Utah statute; Markakis made a profit of $37,022.84 from the transactions he did not elect to rescind.

Respondent Mary Piantes is the sister of respondent Markakis. After Mr. Jay returned from Utah to San Diego, he had several telephone conversations with respondents Piantes, who had purchased Royal Inns stock previously from a broker-dealer other than petitioner. In November, 1969, the Piantes sold those securities through petitioner at a profit. Later the Piantes purchased through petitioner 200 shares of Blue Chip Stamps stock at a price of $4,300.00. By this lawsuit, the Piantes sought to have only the last transaction declared void.

Joe Santis testified at trial that he had learned that Hayden, Stone was not registered in Utah in December, 1969, or January, 1970, and that he informed

the respondent, Alex Markakis, of this fact sometime in January of 1970. [R.T. at p. 114.] Mrs. Piantes testified that her brother, Alex Markakis, did not inform her of this fact until March, 1970. [R.T. at p. 149.]

After the general market decline in March, 1970, respondents wrote letters on May 6, 1970, to Hayden, Stone tendering return of their stock, which had declined in value, and demanded return of their purchase money pursuant to Section 61-1-22 of the Utah Code. [Deft. Ex. No. 6, Pltf. Ex. C, and R.T. at p. 148]. Subsequently, on June 26, 1970, respondents Piantes wrote to petitioner in contradiction to their earlier letter and requested that Hayden Stone send to them the 200 shares of Blue Chip Stamps stock and the two shares of Royal Inns stock that were being held in their name.

At the time of respondents' transactions, petitioner was registered as a broker-dealer in the following 42 jurisdictions: Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. During that period petitioner was also a member of the National Association of Securities Dealers, the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Exchange, the Midwest Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange and the Philadelphia-Baltimore-Washington Stock Exchange.

The Seventh Judicial District Court of Utah ruled that it had personal jurisdiction over petitioner. [Markakis Tr. at p. 246.] The court found that petitioner, acting as a broker-dealer, had solicited the transactions in question in Utah while holding no license from the Utah Department of Business Regulations. [Piantes Tr. p. 45 and Markakis Tr. at p. 230.] The court held that the conduct was unlawful, that the plaintiff's transactions were voidable at respondents' option, and that each respondent could recover from petitioner the entire purchase price of every transaction he elected to void. The court made no finding that petitioner either intended not to register or was negligent in failing to register. There was no finding or evidence that petitioner's failure to register harmed respondents in any way. Nor was there a finding that, had petitioner filed an application and paid the $25.00 filing fee, it would not have been duly registered. On September 27, 1973, the Supreme Court of Utah, in a published opinion by Justice Ellett (514 P.2d 529), affirmed the judgment of the trial court.

Although the Constitutional questions raised by this petition were not raised below, this Court should nevertheless consider the case on its merits for several reasons.

The general rule that an appellate court will refuse to consider an argument not raised below is based upon the equitable notion that parties should have the opportunity to offer all evidence relevant to issues of fact. *Hormel v. Helvering*, 312 U.S. 552, 556, 85 L.Ed. 1037, 1041, 61 S.Ct. 719 (1940).

There are many exceptions to this rule. Justice Black, writing for a unanimous court in *Hormel v. Helvering*,

supra, 312 U.S. at 557, articulated the doctrine in the following terms:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. [citations.]
>
> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Because the questions presented are purely legal in nature, and do not contemplate any factual situation not relevant to the issues raised below, no prejudice will result to respondents by consideration of the questions for the first time by this Court.[2] Respondents were given ample opportunity to present their version of the transactions involved. No different facet of those transactions is made relevant by the questions presented here.

The common theme of the issues raised by this petition is that the penalty imposed by the Uniform Securities Act is unnecessary to enforce the registration

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[2]This lack of prejudice to a respondent has been relied upon by the Supreme Court as the sole basis for hearing an argument for the first time on appeal. (*United States v. Continental Can Co.,* 378 U.S. 441, 457, 12 L.Ed.2d 953, 964, 84 S.Ct. 1738 (1964).)

requirements of that act and counteracts the policy of federal regulation of the securities industry. Certainly no evidence is necessary to demonstrate the effects of a statute permitting every customer of a broker-dealer to rescind selectively transactions made by him in a state where the broker-dealer had neglected or failed to secure a license.

There is an especially important reason for considering the preemption question raised by this petition. On December 4, 1973, after the judgment of the Utah Supreme Court, in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. ..... (Dec. 4, 1973), this Court began to describe the boundaries of the preemption doctrine as it applies to state and federal regulation of the securities industry. The Court examined the purposes of the federal legislation in this area and concluded that New York Stock Exchange Rule 347, Promulgated pursuant to §6 of the Securities Exchange Act of 1934 (15 U.S.C. §78f), did not preempt state wage remedies of a brokerage house employee. The Court found that the state law involved should operate unimpaired since it did not thwart federal objectives in establishing securities exchange supervised self-regulation.

The state penalty applied to petitioner in this case, however, produces results in direct conflict with the policies of the federal statutory scheme. Because the teaching of the *Ware* decision was not available to petitioner in the courts below, petitioner should be permitted to raise the preemption doctrine in this Court. The commencement by this Court in *Ware* of an inquiry into federal-state relations in the securities field is an appropriate basis for considering petitioner's preemption argument. (See *Hormel v. Helvering, supra,*

312 U.S. at 558.)[3] Granting this petition will permit the Court to define further the interrelationship of federal and state laws dealing with the securities industry.

Finally, courts will also hear arguments for the first time on appeal when fundamental rights are involved. Thus, the Due Process Clause question, at least, should be considered by the Court, since due process has been explicitly declared to be a fundamental right sufficient to allow an issue to be argued for the first time on appeal. (*United Transportation U. v. Illinois Central Railroad Co.*, 433 F.2d 566, 571 (7th Cir., 1970); *Gomes v. Williams*, 420 F.2d 1364, 1367 (10th Cir., 1970).)

VI.

Reasons for Granting the Writ.

This Court should review the constitutionality of the unnecessarily harsh penalty imposed by Section 61-1-22 of the Utah Code Annotated because of the severity of its harmful effects upon the national economy. In *Ware*, the Court held that the resolution of wage disputes in the brokerage industry was outside the scope of federal concern. By contrast, the statute involved in this case regulates a field occupied by national legislation. If left unbalanced, the definitional process commenced in *Ware* could invite further state intrusion into areas of securities regulation preempted by Congress.

1. The pervasive federal regulatory scheme in the securities area was enacted in response to the 1929 crash of the stock market and the Great Depression

[3]The extreme importance of issues involving investor protection, standing alone, those issues for the first time on appeal. (*Green v. Brown*, 398 F.2d 1006, 1009 (2d Cir., 1968).

which followed. In enacting the Securities Act of 1933 (15 U.S.C. §77a-77aa) and the Securities Exchange Act of 1934 (15 U.S.C. §78a, *et seq.*), Congress recognized the importance of the securities industry and the securities exchange. "The great exchanges of this country upon which millions of dollars of securities are sold are affected with a public interest in the same degree as any other utility." H.R. Rep. No. 1383, 73d Cong., 2nd Sess. 15 (1934).

Section 2(1) of the Exchange Act (15 U.S.C. §78b) codifies the Congressional finding of the essential nature of the industry:

> "For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:
>
> (1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the officers, directors, and principal security holders,

> exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit."

It is evident from provisions of the Exchange Act that the purposes set forth in Section 2 are to be carried out in part by ensuring the financial stability of the brokerage industry. For example, Section 15A(b)(5) of the act (15 U.S.C. §78o-3(b)(5)), dealing with requirements for S.E.C. registration of associations of broker-dealers, reads in relevant part as follows:

> "An applicant association shall not be registered as a national securities association unless it appears to the Commission that—
>
> (5) the rules of the association provide that . . . no person shall become a member . . . unless such person is qualified to become a member . . . in conformity with specified and appropriate standards with respect to the training, experience, and such other qualifications of such person as the association finds necessary or desirable, and . . . *the financial responsibility of such member.*" (Emphasis added.)

Thus, while most of the membership qualifications are left to the discretion of the exchanges, Congress specifically mandated that broker-dealers be required

to meet standards of financial responsibility. The Securities and Exchange Commission has proposed implementation of the statute through a requirement that no broker or dealer permit his aggregate indebtedness to exceed 1500% of his net capital. (Proposed S.E.C. Rule 15c3-1, 17 C.F.R. 240.15c3-1.) That ratio has already been adopted by the New York Stock Exchange. (New York Stock Exchange Rule 325.) The operation of the Utah statute challenged by petitioner tends to undermine these regulations.

As the Government noted at pages 6 and 7 of its amicus curiae brief in the *Ware* case, the authority conferred upon the Securities and Exchange Commission by Section 19(b) of the Exchange Act (15 U.S.C. §78s(b)), to alter or supplement exchange rules on twelve specified subjects, impliedly authorizes the exchanges to adopt rules on the enumerated matters. Since the "Commission's powers of direct rule making . . . and its 'reserved' authority . . . provide the Commission with pervasive regulatory authority over and responsibility for the operations of exchange markets and the conduct of persons who use those markets", (*Security Industry Study*, Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, S.Doc. No. 93-13, 93d Cong., 1st Sess., p. 143), any state statute inconsistent with exchange or Commission regulation upon the twelve specified subjects of Section 19(b) must fall under the preemption doctrine. Significantly, the first item on the list of matters enumerated by Section 19 (b) reads: "safeguards in respect of the financial responsibility of [exchange] members and adequate provision against the evasion of financial responsibility

through the use of corporate forms or special partnerships. . . ." The unnecessarily severe statutory penalty of Utah, which impairs the net capital rule of the New York Stock Exchange and the proposed Commission rule on that subject, is therefore preempted by the federal regulation.

An examination of the federal securities acts reveals that all serve the common purpose of preserving and enhancing the important national economic functions performed by securities transactions, by encouraging the informed flow of capital to industries engaged in interstate commerce. The disclosure provisions of the Securities Act of 1933 foster this objective by protecting investors against fraudulent practices, thereby inspiring public confidence and participation in the capital markets of the United States. The Exchange Act promoted investor protection still further by extending the disclosure principle to securities listed on the national securities exchanges, and reiterating the prohibition against fraudulent or manipulative practices in any transaction in securities. The Securities Acts Amendments of 1964 applied the disclosure requirements of that Act to the over-the-counter market.

The Public Utility Holding Company Act of 1935 (15 U.S.C., §§79 to 79z-6), although designed to rectify problems found in a particular industry, evidences a continuing Congressional concern that private savings be marshaled for investment in interstate industry on a fair and equitable basis. The Trust Indenture Act of 1939 (15 U.S.C. §§77aaa-77bbbb) extended the registration requirements of the 1933 Act to debt securities, ensuring that independent trustees be appointed to protect and enforce the rights of investors.

The Investment Company Act of 1940 (11 U.S.C. §§72, 107; 15 U.S.C. 80a-1 to 80a-52) is based upon the Congressional finding that investment companies are affected with a national public interest. This act promotes investor confidence by such devices as regulating the custody of the companies' assets, requiring the disclosure of finances and investment policies of the companies, and prohibiting the companies from changing the nature of such policies without shareholder approval. A companion to the Investment Company Act is the Investment Advisers Act of 1940 (15 U.S.C. §§80b-1 to 80b-21), which requires registration of investment advisers and prohibits them from engaging in fraudulent, deceptive or manipulative practices.

The most recent legislation in the securities area, the Securities Investor Protection Act of 1970 (15 U.S.C. §78aaa, *et seq.*), establishes the Securities Investor Protection Corporation (SIPC), which administers a fund comprised of contributions from member brokerage houses. The fund is used to insure investors up to $50,000.00 against loss due to brokerage house failures, thereby increasing investor confidence and promoting the flow of investment capital.

The importance of the securities industry to the functioning of the national economy has been recognized by this Court. The Court in *Silver v. New York Stock Exchange,* 373 U.S. 341, 349-350, 10 L.Ed.2d 389, 395, 396, 83 S.Ct. 1246 (1963), outlined the vital nature of the securities industry in the following terms:

> "The need for statutory regulation of securities exchanges and the nature of the duty of self-regulation imposed by the Securities Exchange Act are properly understood in the context of a con-

sideration of both the economic role played by exchanges and the historical setting of the Act. Stock exchanges perform an important function in the economic life of this country. They serve, first of all, as an indispensable mechanism through which corporate securities can be bought and sold. To corporate enterprise such a market mechanism is a fundamental element in facilitating the successful marshaling of large aggregations of funds that would otherwise be extremely difficult of access. To the public the exchanges are an investment channel which promises ready convertibility of stock holdings into cash. The importance of these functions in dollar terms is vast . . . Moreover, because trading on the exchanges, in addition to establishing the price level of listed securities, affects securities prices in general, and because such transactions are often regarded as an indicator of our national economic health, the significance of the exchanges in our economy cannot be measured only in terms of the dollar volume of trading."

The 1968-1970 sharp stock market decline[4] brought to the store front the need for further national regulation of the securities industry. The necessity of ensuring the financial viability of brokerage houses was particularly emphasized by the high number of brokerage failures during this downturn. By 1971, over 100 member organizations had vanished from the New

[4]From the high in December, 1968, to the low in May, 1970, the Dow Jones average dropped 36 per cent, the New York Stock Exchange average dropped 54 per cent and the American Stock Exchange average dropped 63 per cent.

York Stock Exchange roster, and an unknown number of nonmember firms had also disappeared.[5]

The Securities Industry Study Report (see footnote 5) urged Congress to take further steps to promote the financial vitality of the brokerage industry. The reasons for this recommendation, given at page 38 of the report, stress the interdependency of brokerage firms:

> "First, the investing public must be protected against the consequences of brokerage failure. The Subcommittee believes that the SIPC legislation is a significant step in this direction. There may be some imperfections in the SIPC legislation, however, and the Subcommittee will address them as soon as sufficient experience has been gained under the statute.
>
> "Second, the consequences of brokerage failure should be confined as nearly as possible to the individual firm and not be allowed to permeate the entire brokerage industry or to have a significant detrimental effect upon the nation's economy. As Robert W. Haack, former President of the New York Stock Exchange, said in a letter of May 25, 1970 to the Director of the Commission's Division of Trading and Markets:
>
> '. . . there is a high degree of interdependence among members of the Exchange community which results from the contractual relationship among the Exchange, Stock Clearing Corporation and Members and Member Organizations. Not only must the Exchange be concerned with

[5]Security Industry Study, Report of the Subcommittee of the Senate Committee on Banking, Housing and certain Affairs, S. Doc. No. 93-13, 93rd Cong., 1st Sess., p. 29.

> the solvency and liquidity of individual members but it must also be concerned with the overall liquidity of the marketplace. Reasonable administration of rule 325 demands due consideration of the impact of remedial action with respect to one member organization upon the wider circle of other brokers and their customers, etc.'
>
> "Without accepting or rejecting the conclusions stated in Mr. Haack's letter, his observation of a possible domino effect of the failure of one or more brokerage houses is noteworthy. *For, in the ordinary course of their business, brokers and dealers become debtors or creditors of, and deposit funds and securities with, one another and with various clearing corporations and securities depositories. When one broker's account with another firm is placed in jeopardy due to insolvency, it is entirely possible that both firms will fail. The possibility of cumulative effects in such a situation is a matter of serious concern.*" (Emphasis added.)

2. The effect of Section 61-1-22 of the Utah Code Annotated, under which petitioner was found liable, conflicts with the purposes of the federal legislation discussed above. This section, as interpreted by the Supreme Court of Utah, allows every purchaser of securities to rescind any or all purchases at his option which were made through a broker-dealer who failed to obtain a state license. The statute holds the broker liable for all losses without any set-off for gains. The broker is strictly liable—there is no requirement that the court find negligence, let alone intent. Nor is there any requirement that the broker's failure to register be the cause of the purchaser's loss.

The punishment imposed by the statute bears no rational relationship to its intended function, which is to enforce Utah's licensing requirement. The penalty depends upon market conditions and the dollar amount of the transactions involved. If, for example, a license application were misplaced in a populous state, such as New Jersey or Michigan, which have also adopted the Uniform Securities Act, damages could reach many millions of dollars in a down market. In addition, the penalty provision is subject to abuse by a customer, who can take a "free ride" by purchasing or retaining securities purchased from a broker-dealer the customer knows is not licensed. Thus, plaintiffs in this case rescinded in May of 1970, the month in which the market reached its low. Respondent Markakis learned that petitioner was not licensed five months prior to that time. The transactions plaintiffs had executed with petitioner before the market decline, were, of course, not rescinded, since those transactions were profitable to them.

Thus, the effect of this section is to provide no penalty at all in an up market but to provide devastating punishment at the worst possible time for the national economy—when a severe bear market is restricting the flow of capital into the equities markets. It thereby accentuates the impact of downward fluctuations of the market. This effect runs directly contrary to the objective of the Securities Exchange Act of 1934, as articulated by Sections 2(3) and 2(4) of that act:

> "(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, *resulting in sudden and unreasonable fluctuations in the*

price of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

"(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and *sudden and unreasonable fluctuations of security prices* and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit." (Emphasis added.)

Petitioner does not question Utah's right to require brokerage houses to obtain state licenses. Nor does petitioner complain of the $25.00 filing fee charged by the Utah Department of Business Relations. Petitioner contends only that the penalty imposed for failure to comply unduly interferes with the objectives of federal securities regulation, and is unnecessary to enforce the Utah licensing requirement. The situation is analogous to that involved in *Hill v. Florida,* 325 U.S. 538, 89 L.Ed. 1782, 65 S.Ct. 588 (1944). In *Hill* the Court held that federal labor legislation preempted the pen-

alty provision of a Florida statute requiring licensing of labor unions. In discussing the statute, the Court made clear it was the enforcement provision only which rendered the law invalid:

> "The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. *It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining.*" 325 U.S. at 543. (Emphasis added.)

As was pointed out at pages 3 and 4 of the Brief the United States as Amicus Curiae in the case of *Merrill Lynch, Pierce, Fenner & Smith v. Ware, supra.*

> "A finding of preemption may be dictated by the nature of the regulated subject, . . . [*Florida Line & Avocado Grower, Inc. v. Paul,* 373 U.S. 132, 142], by the existence of a pervasive and comprehensive scheme of federal regulation that 'requires a uniform and exclusive system of federal regulation' to fulfill the federal statutory purposes, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639, or by the presence of such a conflict with the federal statute or the federal regulatory scheme that application of the state law would frustrate the purpose of the federal law. *Colorado Anti-Distrimination Comm'n v.*

Continental Air Lines, Inc., 372 U.S. 714, 724; *Rice v. Chicago Board of Trade*, 331 U.S. 247, 253-255."

Petitioner relies upon the third basis of preemption discussed by the Government's brief. The conflict between the purpose of the federal securities regulatory scheme and Utah's unnecessarily excessive penalty causes the state statute to be preempted. The fact that Utah may not have intended to thwart federal policy by enacting Section 410 of the Uniform Securities Act is not relevant to the issue of preemption. (*Perez v. Campbell*, 402 U.S. 637, 651-652, 29 L.Ed. 2d 233, 243, 91 S.Ct. 1704 (1971).)

The statutory remedy does not appear necessary to serve any state interest. Compensation of the customer could not be its purpose since recovery is not dependent upon causation. There is no reason for a broker-dealer to indemnify its customers against all losses over which it had no control and which it did not cause. The remedy is calculated to enforce the licensing requirement in the crudest of ways. It is most effective in a bear market, and imposes excessive liability without fault. The harmful effects envisioned by this petition are not unlikely. Utah is not the only state requiring broker-dealers to obtain a license. Petitioner, at the time this suit arose, was registered in 41 states and Washington, D.C., and was a member of the National Association of Securities Dealers and seven stock exchanges. The thicket of regulation by these jurisdictions and associations, as well as the federal government, requires of broker-dealers a tremendous amount of paper work with its inevitable potential mistakes.

VII.

Conclusion.

Petitioner urges the Court to grant a writ of certiorari in this proceeding. Petitioner also respectfully requests that the Court invite the Solicitor General to express the views of the United States in the case.

Respectfully submitted,

WALTER S. WEISS,
Counsel for Petitioner.

APPENDIX A.

Findings of Fact and Conclusions of Law.

In the Seventh Judicial District Court in and for the County of Carbon, State of Utah.

Alex N. Markakis, Plaintiff, vs. Hayden-Stone, Incorporated, a Delaware corporation, Defendant. Civil No. 9776.

The above-entitled cause came on regularly for trial on the 1st day of August, 1972 before the Court sitting without a jury; Warren M. Weggeland appearing as counsel for the plaintiff, and Arthur H. Nielsen appearing as counsel for the defendant; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having heard arguments of counsel, and being fully advised in the premises, the following Findings of Fact and Conclusions of Law constituting the decision of the Court in said action are hereby made:

FINDINGS OF FACT

1. That plaintiff is a resident of Carbon County, State of Utah.

2. That defendant is a Delaware corporation not qualified to do business in the State of Utah as a foreign corporation.

3. That defendant's principal business during the period October 1, 1968 through December 31, 1969 was that of broker-dealer; that during such period defendant did engage in the business of effecting transactions in securities for the account of others and did engage in the business of buying and selling securities for its own account as part of its regular business.

4. That during the period January 1, 1969 through December 31, 1969, defendant was registered and licensed as a broker-dealer in the States of Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming; during such period defendant was a member of the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Stock Exchange, the Midwest Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange, the Philadelphia-Baltimore-Washington Stock Exchange.

5. That during the period October 1, 1968 to December 31, 1969, defendant maintained an office at 100 West "C" Street, San Diego, California.

6. That during the period October 1, 1968 through December 31, 1969, defendant was not licensed and registered as a broker-dealer by the Utah Department of Business Regulation, Securities Division.

7. That on October 27, 1969, plaintiff purchased from defendant, acting as agent, 1000 shares of Occidental Petroleum Corporation preferred stock at a cost of $43,656.30; that on October 28, 1969, plaintiff purchased from defendant, acting as principal, 1000 shares of King Resources Company common stock at a cost of $28,875.00; that on December 18, 1969, plaintiff purchased from defendant, acting as agent, 1000 shares of Royal Inns of America common stock at a cost of $28,330.00.

8. That at no time has plaintiff been an officer, director, agent, or employee of defendant corporation.

9. That during the period January 1, 1969 to December 31, 1969, defendant did solicit plaintiff to purchase or sell securities from or through defendant, which solicitations involved at least 35 telephone calls originating at defendant's San Diego, California office and directed to plaintiff at his home or place of business in Price, Utah; that at least 8 additional solicitations occurred in Price, Utah during personal conversations between plaintiff and defendant's agent, employee and registered representative.

10. That at the time of such solicitations by defendant of plaintiff to engage in buy or sell securities transactions, plaintiff had no knowledge that defendant was not duly licensed or registered as a broker-dealer by the State of Utah.

11. That during the period January 1, 1969 through December 31, 1969, defendant did direct more than 15 offers to sell or buy into this state to persons other than banks, savings institutions, trust companies, insurance companies, investment companies (as defined in the Investment Company Act of 1940), pension or profit-sharing trusts, other broker-dealers, other financial institutions or institutional buyers, whether acting for themselves or as trustees, or with or through the issuers of the securities involved in the transactions; that during such period defendant did direct at least 86 solicitations of offers to sell or buy securities into this state to persons residing in and present in this state, other than those referred to in this paragraph above.

12. That on May 27, 1970, plaintiff, by and through his counsel, did tender in writing to defendant

the securities referred to in paragraph 7 above, and did demand a return of the purchase price thereof; that subsequent thereto, defendant rejected plaintiff's tender; that plaintiff did tender prior to judgment and deposit in court the securities referred to in paragraph 7 above.

13. That since the date of purchase by plaintiff of securities of Royal Inns of America, plaintiff has received a stock dividend of 102 shares, which shares have been tendered by plaintiff and deposited in court; that since the date of purchase by plaintiff of the securities of Occidental Petroleum Corporation, plaintiff has received dividends totaling $5,940.00, which dividends were paid quarterly and consist of 11 quarterly dividends of $540.00 each.

14. That the parties have stipulated that the plaintiff has expended costs in this action in an amount of $160.10.

15. That plaintiff's attorney expended approximately 150 hours in connection with the prosecution of this action. That a reasonable attorney's fee to be awarded plaintiff is the amount of $8,000.00.

From the foregoing Findings of Fact, the Court now makes and enters the following

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the person of defendant and the subject matter of this action.

2. That defendant has transacted business in this state in the capacity and function of a broker-dealer.

3. That defendant is subject to the licensing and registration requirements of the Utah Uniform Securities Act; that the number of solicitations of brokerage transactions by defendant directed into this state exceeded by 71 that number of offers to buy or sell

securities exempt under the provisions of the Utah Uniform Securities Act.

4. That the conducting of business in the State of Utah by defendant during the period was unlawful; that the solicitations of brokerage transactions by defendant directed into this state were unlawful; that the securities transactions of plaintiff with defendant, the subject of this action, are voidable at the election of plaintiff.

5. That plaintiff is not in pari delicto with defendant; that plaintiff has not waived any claims or rights he has against defendant, nor is plaintiff guilty of laches or estoppel or barred from maintaining this action.

6. That plaintiff made good and valid tender of the securities involved in this action. That defendant is entitled to possession of certificates representing the securities the subject of this action, together with any dividends received thereon subsequent to August 2, 1972, upon satisfaction of plaintiff's judgment against said defendant.

7. That plaintiff is entitled to rescind the transactions wherein plaintiff purchased securities of King Resources Company, Royal Inns of America and Occidental Petroleum Corporation and recover his purchase price thereof, plus interest from the dates of purchase, costs of court and reasonable attorney's fees, less dividends received, and that plaintiff is entitled to a judgment against defendant in such amounts.

DATED this 25 day of October, 1972.

BY THE COURT:

Henry Ruggeri
District Court Judge

APPENDIX B.

Findings of Fact and Conclusions of Law.

In the Seventh Judicial District Court in and for, Carbon County, State of Utah.

Gus T. Piantes and Mary M. Piantes, his wife, Plaintiffs, vs. Hayden-Stone, Inc., a Delaware corporation, and H-S Equities, Inc., a corporation, Defendants. Civil No. 9987.

The above-entitled cause came on regularly for trial on the 1st day of August, 1972 before the Court sitting without a jury; Warren M. Weggeland appearing as counsel for the plaintiffs, and Arthur H. Nielsen appearing as counsel for the defendants; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having heard arguments of counsel, and being fully advised in the premises, the following Findings of Fact and Conclusions of Law constituting the decision of the Court in said action are hereby made:

FINDINGS OF FACT

1. That plaintiffs are residents of Carbon County, State of Utah.

2. That defendant Hayden-Stone, Inc. is a Delaware corporation not qualified to do business in the State of Utah as a foreign corporation.

3. That defendant Hayden-Stone, Inc.'s principal business during the period October 1, 1968 through December 31, 1969 was that of broker-dealer, that during such period said defendant did engage in the business of effecting transactions in securities for the account of others and did engage in the business of

buying and selling securities for its own account as part of its regular business.

4. That during the period January 1, 1969 through December 31, 1969, defendant Hayden-Stone, Inc. was registered and licensed as a broker-dealer in the States of Alabama. Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming; during such period said defendant was a member of the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Stock Exchange, the Midwest Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange, the Philadelphia-Baltimore-Washington Stock Exchange.

5. That during the period October 1, 1968 to December 31, 1969, defendant Hayden-Stone, Inc. maintained an office at 100 West "C" Street, San Diego, California.

6. That during the period October 1, 1968 through December 31, 1969, defendant Hayden-Stone, Inc. was not licensed and registered as a broker-dealer by the Utah Department of Business Regulation, Securities Division.

7. That on the 19th day of November, 1969. plaintiffs purchased through the San Diego, California office of defendant Hayden-Stone, Inc. 200 shares of Blue Chip Stamps common stock at a price of $21.50

per share, for a total purchase price of $4,300.00, which securities were purchased from said defendant acting as principal.

8. That at no time have either of the plaintiffs been an officer, director, agent or employee of either of the defendant corporations.

9. That H-S Equities is a corporation, the successor of defendant.

10. That during the period November 20, 1968 to November 26, 1969, defendants did solicit plaintiffs to purchase or sell securities from or through defendants, which solicitations involved at least 18 telephone calls originating at defendants' San Diego, California office and directed to plaintiffs at their home or the place of business of the plaintiff Mary Piantes in Price, Utah; that at least 4 additional solicitations occurred in Price, Utah during personal conversations between plaintiffs and defendants' agent, employee and registered representative.

11. That at the time of such solicitations by defendants of plaintiffs to engage in buy or sell securities transactions, plaintiffs had no knowledge that defendants were not duly licensed or registered as broker-dealers by the State of Utah.

12. That during the period November 20, 1968 through November 19, 1969, defendants did direct more than 15 offers to sell or buy into this state to persons other than banks, savings institutions, trust companies, insurance companies, investment companies (as defined in the Investment Company Act of 1940), pension or profit-sharing trusts, other broker-dealers, other financial institutions or institutional buyers, whether acting for themselves or as trustees, or with or

through the issuers of the securities involved in the transactions; that during such period defendants did direct at least 86 solicitations of offers to sell or buy securities into this state to persons residing in and present in this state, other than those referred to in this paragraph above.

13. That on May 6, 1970 and October 5, 1971, plaintiffs did tender in writing to defendants the securities referred to in paragraph 7 above, and did demand a return of the purchase price thereof; that plaintiffs' tender was rejected by defendants; that plaintiffs did tender prior to judgment and deposit with the court the securities referred to in paragraph 7 above.

14. That since the date of purchase by plaintiffs of the securities of Blue Chip Stamps, plaintiffs have received a cash dividend totaling $20.00.

15. That the parties have stipulated that the plaintiffs have expended costs in this action in an amount of $30.04.

16. That plaintiffs' attorney has expended approximately 60 hours in the prosecution of this case. That a reasonable attorney's fee to be awarded plaintiffs for the prosecution of this action is the amount of $2,000.00.

From the foregoing Findings of Fact, the Court now makes and enters its

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the person of defendants and the subject matter of this action.

2. That defendants have transacted business in this state in the capacity and function of a broker-dealer.

3. That defendants are subject to the licensing and registration requirements of the Utah Uniform Securities Act; that the number of solicitations of brokerage transactions by defendants directed into this state exceeded by 71 that number of offers to buy or sell securities exempt under the provisions of the Utah Uniform Securities Act.

4. That the conducting of business in the State of Utah by defendants during the period was unlawful; that the solicitations of brokerage transactions by defendants directed into this state were unlawful; that the securities transactions of plaintiffs with defendant, the subject of this action, are voidable at the election of plaintiffs.

5. That plaintiffs are not in pari delicto with defendants; that plaintiffs have not waived any claims or rights they have against defendants, nor are plaintiffs guilty of laches or estoppel or barred from maintaining this action.

6. That plaintiffs made good and valid tender of the securities involved in this action. That defendants are entitled to possession of the certificates representing the securities the subject of this action, together with any dividends received thereon subsequent to August 2, 1972, upon satisfaction of plaintiffs' judgment against said defendants.

7. That plaintiffs are entitled to rescind the transaction wherein they purchased securities of Blue Chip Stamps and recover their purchase price thereof, plus

interest from the date of purchase, costs of court and reasonable attorney's fees and less dividends received; and that plaintiffs are entitled to a judgment against defendant Hayden-Stone, Inc. in such amounts.

DATED this 25 day of October, 1972.

BY THE COURT:
Henry Ruggeri
District Court Judge

Amendment to Findings of Fact and Conclusions of Law.

In the Seventh Judicial District Court in and for Carbon County, State of Utah.

Gus T. Piantes and Mary M. Piantes, his wife, Plaintiffs, vs. Hayden-Stone, Inc., a Delaware corporation, and H-S Equities, Inc., a corporation, Defendants. Civil No. 9987.

The above-entitled matter came on regularly for hearing before The Honorable Henry Ruggeri on the 6th day of November, 1972, pursuant to defendants' objections to and motion to amend Findings of Fact, Conclusions of Law and Judgment; the parties not appearing in person but being represented by their respective counsel of record, Warren M. Weggeland for the plaintiffs and Arthur H. Nielsen for the defendants; whereupon the Court heard arguments of counsel and being fully advised in the premises now makes and enters the following amendment to the Findings of Fact and Conclusions of Law heretofore entered by this Court in the above-entitled action on the 25th day of October, 1972.

FINDINGS OF FACT

1. That paragraph 1 of the Findings of Fact is herewith amended as follows:

> 1. That plaintiffs are residents of Carbon County, State of Utah. That defendant Hayden-Stone, Inc. is a Delaware corporation not qualified to do business in the State of Utah as a foreign corporation.

2. That paragraph 2 of the Findings of Fact is herewith amended as follows:

> 2. That service of process was obtained against said defendants by having Terry Rossiter, deputy constable, First Precinct, Salt Lake County, State of Utah, serve copies of Summons and Complaint on William E. Sargeant, director, Utah State Securities Commission, as required by Utah Code Ann. §61-1-26(7). That on the 13th day of January, 1972, Notice of Service of Process was deposited with the United States mail by counsel for plaintiffs and mailed to defendants herein, together with a copy of the Summons, Complaint and Return of Service, which pleadings and documents were mailed by registered mail to defendant H-S Equities, Inc. at 79 Pine Street, New York, New York; defendant Hayden-Stone, Inc. at 110 West "C" Street, San Diego, California; defendant Hayden-Stone, Inc. in care of Corporation Trust Company, 100 West Tenth Street, Wilmington, Delaware; and Hayden-Stone, Inc. at 25 Broad Street, New York, New York, as required by Utah Code Ann. §61-1-26(7). Further, that there was filed with the clerk of this court on or about the 17th day of January, 1972, plaintiffs' Affidavit of Compliance as required by Utah Code Ann. §61-1-26(7).

From the Findings of Fact as heretofore entered and the foregoing amendment to Findings of Fact, the Court now makes and enters the following amendment to Conclusions of Law:

CONCLUSIONS OF LAW

1. There shall be added to the Conclusions of Law heretofore entered by this Court in the above-entitled action an additional paragraph numbered 8, as follows:

> 8. That defendants are entitled to an order requiring plaintiffs to deposit with the clerk of this court any and all dividends received by plaintiff on the securities the subject of this action from and after the 2d day of August, 1972.

DATED this 9th day of November, 1972.

BY THE COURT:

Henry Ruggeri, District Judge

APPENDIX C.

Amended Judgment.

In the Seventh Judicial District Court in and for the County of Carbon, State of Utah.

Alex N. Markakis, Plaintiff, vs. Hayden-Stone Incorporated, a Delaware corporation, Defendant. Civil No. 9776.

The above-entitled matter came on regularly for trial on the 1st day of August, 1972, before the Court sitting without a jury; Warren M. Weggeland appearing as counsel for the plaintiff, and Arthur H. Nielsen appearing as counsel for the defendant; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having heard arguments of counsel, and being fully advised in the premises, and the Court, having heretofore made and entered its Findings of Fact and Conclusions of Law, and having made and entered an Amendment to its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff is awarded a judgment against defendant as follows:

1. For the purchase price of the securities involved, plus interest, less applicable dividends received, as follows:

A. For an amount of $43,656.30 representing the purchase price of Occidental Petroleum Corporation preferred stock, plus interest thereon from the date of payment, less dividends received, for total interest of $1,823.60; for a total amount of $45,479.90.

B. For an amount of $28,330.00 representing the purchase price of Royal Inns of America common

stock, plus interest thereon from the date of payment in an amount of $4,816.10; for a total amount of $33,146.10.

C. For an amount of $28,875.00 representing the purchase price of King Resources Company common stock, plus interest thereon from the date of payment in an amount of $5,149.40; for a total amount of $34,024.40.

2. For plaintiff's costs incurred in the amount of $160.10.

3. For attorney's fees in an amount of $8,000.00.

4. For a total judgment against defendant of $100,861.30, interest of $11,789.10, costs of $160.10 and attorney's fees in the amount of $8,000.00, which amount totals $120,810.50, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon entry of satisfaction of judgment, defendant is entitled to possession and title to the stock certificates representing 1,000 shares of Occidental Petroleum Corporation preferred stock; 1,000 shares of King Resources Company common stock; and 1,000 shares of Royal Inns of America common stock, plus 102 shares of Royal Inns of America common stock received by plaintiff as a stock dividend, together with all dividends accrued or paid thereon from and after August 2, 1972, and plaintiff is herewith ordered to deposit with the clerk of this court any and all dividends received from and after August 2, 1972.

DATED this 9th day of November, 1972.

BY THE COURT:
Henry Ruggeri, District Judge

APPENDIX D.

Amended Judgment.

In the Seventh Judicial District Court in and for the County of Carbon, State of Utah.

Gus T. Piantes and Mary M. Piantes, his wife, Plaintiffs, vs. Hayden-Stone, Inc., a Delaware corporation, and H-S Equities, Inc., a corporation, Defendants. Civil No. 9987.

The above-entitled matter came on regularly for trial on the 1st day of August, 1972, before the Court sitting without a jury; Warren M. Weggeland appearing as counsel for the plaintiffs, and Arthur H. Nielsen appearing as counsel for the defendants; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having heard arguments of counsel, and being fully advised in the premises, and the Court, having heretofore made and entered its Findings of Fact and Conclusions of Law, and having made and entered an Amendment to its Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded a judgment against defendant Hayden-Stone, Inc. as follows:

For an amount of $4,300.00 representing the purchase price of Blue Chip Stamps common stock, plus interest thereon from the date of payment in an amount of $732.50, plus costs of court in an amount of $30.04, and for attorney's fees in an amount of $2,000.00, for a total judgment against defendant of $7,062.54, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon entry of satisfaction of judgment, defendants are entitled to possession and title to the stock certificates representing an aggregate of 200 shares of Blue Chip Stamps common stock, together with all dividends accrued or paid thereon from and after August 2, 1972, and plaintiffs are herewith ordered to deposit with the clerk of this court any and all dividends received from and after August 2, 1972.

DATED this 9th day of November, 1972.

BY THE COURT:

Henry Ruggeri, District Judge

APPENDIX E.

In the Supreme Court of the State of Utah.

Gus T. Piantes and Mary M. Piantes, his wife, Plaintiffs and Respondents, v. Hayden-Stone, Inc. a Delaware corporation, and H-S Equities, Inc., a corporation, Defendants and Appellants. No. 13143.

Alex N. Markakis, Plaintiff and Respondent, v. Hayden-Stone, Incorporated, a Delaware corporation, Defendant and Appellant. No. 13144.

Filed: September 27, 1973.

ELLETT, Justice:

This is an action by plaintiffs to recover the consideration paid to Hayden-Stone, Inc., hereinafter called the defendant, for certain securities which defendant sold to them.[1]

The defendant as a broker-dealer is registered in some 41 states of the Union, although not in Utah. Its office is located in San Diego, California. It claims it did no business in Utah and that it is immune from suit here. It also contends that if a rescission of any stock transaction is permitted, all transactions must be rescinded.

Our statute[2] requires a broker-dealer or agent to be registered before it can transact business in this state and further provides that a purchaser of securities from an unlicensed broker may sue to recover the purchase price, etc.[3] The statute further provides that a broker-dealer is not to be held as engaging in busi-

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[1]Appellant H-S Equities, Inc., is a successor in interest to appellant Hayden-Stone, Inc.

[2]Section 61-1-3, U.C.A. 1953 (Replacement Vol. 7A).

[3]Section 61-1-22, U.C.A. 1953 (Replacement Vol. 7A).

ness during any period of twelve consecutive months if it does not direct more than 15 offers to sell or buy to persons located in Utah during that time.

On believable evidence the trial court found that in the year 1969 when the purchases complained of were made, the defendant made not less than 35 telephone calls from its office in San Diego, California, to the plaintiffs, soliciting the buying or selling of securities, and that defendant's agent made at least eight personal solicitations in Utah. The court further found that during the year 1969 the defendant made at least 86 solicitations to buy or sell securities to other people in Utah.

In regard to defendant's claim that it is immune from suit here, it should be noticed that two actions were consolidated for trial and for appeal. In the Piantes case jurisdiction was obtained pursuant to the provisions of Section 61-1-26(7) of the Utah Uniform Securities Act. In the Markakis case jurisdiction was obtained under Section 78-27-22, U.C.A. 1953, as amended, known as the long arm statute, which permits jurisdiction over nonresidents who through significant minimal contacts within this state incur obligations to citizens thereof. These minimal contacts are set forth in the statute.

The question to be considered is this: Is the manner of obtaining jurisdiction over one in violation of the Securities Act, as set out in Section 61-1-26(7), U.C.A. 1953, the exclusive method of acquiring jurisdiction?

The section by its language does not purport to be the exclusive means of acquiring jurisdiction, as it plainly states, "When . . . personal jurisdiciton over him cannot otherwise be obtained," etc. The section simply gives a special means of bringing into court one

who violates the Securities Act. It does not prevent the obtaining of personal jurisdiction by any other means provided by statute. If it did so, personal service in this state, if it could be obtained, would not be proper although the statute says that the service provided for is equivalent to personal service.

We hold that the trial court had jurisdiction over the defendant to make the judgment rendered.

In support of its contention that if a rescission of any stock transaction is permitted, all transactions must be rescinded and that the lower court erred in permitting plaintiffs to void selected transactions rather than treating the transactions and relationships as a whole, defendant cites the case of Mellott v. Love,[4] which says, ". . . [T]he disaffirmance of a contract made by an infant nullifies it and renders it void ab initio, and all parties are restored to the status in which they would have been if the contract had never been made." However, that case is not applicable to the instant matter because our statute does not require a purchaser of securities from an unregistered broker to set aside all transactions but permits rescission of any purchase which the purchaser chooses to make. The protection afforded to a purchaser is for his benefit and is at his option. He need not rescind any transaction unless he chooses to do so. The option is his and his alone.

The judgment of the trial court is affirmed. Costs are awarded to the respondents.

E. R. Callister, Jr., *Chief Justice*
F. Henri Henriod, *Justice*
J. Allan Crockett, *Justice*
R. L. Tuckett, *Justice*

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[4]Mellott v. Love, 119 So. 913 (Miss. 1929).

APPENDIX F.

United States Constitution, Article VI, Section 2.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
United States Constitution, Fourteenth Amendment, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 61-1-3, Utah Code Annotated.

"(1) It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he is registered under this act.

"(2) It is unlawful for any broker-dealer or issuer to employ an agent unless the agent is registered. The registration of an agent is not effective during any period when he is not associated with the particular broker-dealer registered under this act or a particular issuer. When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make him an agent, the

agent as well as the broker-dealer or issuer shall promptly notify the commission.

"(3) It is unlawful for any person to transact business in this state as an investment adviser unless he is so registered under this act or he is registered as a broker-dealer without the imposition of a condition under section 61-1-6(3)(e), or his only clients in this state are investment companies as defined in the Investment Company Act of 1940 or insurance companies."

Section 61-1-22, Utah Code Annotated.

"(1) Any person who (a) offers or sells a security in violation of section 61-1-3(1), 61-1-7, or 61-1-17 (2) or of any rule or order under section 61-1-15 which requires the affirmative approval of sales literature before it is used, or of any condition imposed under section 61-1-10(4), 61-1-11(7), or (b) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security. Damages are the amount that

would be recoverable upon a tender less the value of the security, when the buyer disposed of it and interest at six per cent per year from the date of disposition.

"(2) Every person who directly or indirectly controls a seller liable under subsection (1), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable;

"(3) Any tender specified in this section may be made at any time before entry of judgment.

"(4) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

"(5) No person may sue under this section more than two years after the contract of sale. No person may sue under this section (i) if the buyer reviewed [received] a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six per cent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within thirty days of its receipt.

"(6) No person who has made or engaged in the performance of any contract in violation of any provision of this act or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

"(7) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act or any rule or order hereunder is void.

"(8) The rights and remedies provided by this act are in addition to any other rights or remedies that may exist at law or in equity, but this act does not create any cause of action not specified in this section or section 61-1-4(5)."